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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Preprint

RECOMMENDATION

Common Interest Development Law: Procedural
Fairness in Association Rulemaking
and Decisionmaking

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California Law Revision Commission
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SUMMARY OF RECOMMENDATION

The Law Revision Commission is engaged in a general study of the law relating to common interest developments. The objective of the study is to set a clear, consistent, and unified policy with regard to their formation and management and the transaction of real property interests located within them. The study will seek to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, and determine to what extent common interest housing developments should be subject to regulation.

In this recommendation, the Commission recommends that fair and reasonable procedures be required when a community association board adopts operating rules or reviews a member's request to make changes to the member's separate interest property.

This recommendation was prepared pursuant to Resolution Chapter 166 of the Statutes of 2002.

COMMON INTEREST DEVELOPMENT LAW

BACKGROUND

The main body of law governing common interest developments is the Davis-Stirling Common Interest Development Act.¹ Other key statutes include the Subdivision Map Act, the Subdivided Lands Act, the Local Planning Law, and the Nonprofit Mutual Benefit Corporation Law, as well as various environmental and land use statutes. In addition, statutes based on separate, rather than common, ownership models still control many aspects of the governing law.² The complexities and inconsistencies of this statutory arrangement have been criticized by homeowners and practitioners, among others.³

The Law Revision Commission is reviewing the statutes affecting common interest developments with the goal of setting a clear, consistent, and unified policy with regard to their formation and management and the transfer of real property interests located within them. The objective of the review is to clarify the law and eliminate unnecessary or obsolete provisions, to consolidate existing statutes in one place in the codes, and to determine to what extent common interest housing developments should be subject to regulation.

The Commission will make a series of recommendations proposing revision of the laws governing common interest developments. A previous recommendation addressed the organization of the Davis-Stirling Common Interest Development Act.⁴ The organization of this recommendation is premised on enactment of that prior recommendation.

PROCEDURAL FAIRNESS IN ASSOCIATION

RULEMAKING AND DECISIONMAKING

The Commission is examining ways in which to minimize reliance on the courts to resolve disputes between a community association⁵ and its members. One approach is to reduce the number of disputes that arise by ensuring that decisionmaking procedures used by a community association are fair and reasonable. A decision made under a fair and reasonable procedure is more likely

1. Civ. Code § 1350 *et seq.*

2. See, e.g., Civ. Code §§ 1102 *et seq.*, 2079 *et seq.* (real estate disclosure).

3. See, e.g., SR 10 (Lee & Sher) (Apr. 10, 1997); California Research Bureau, *Residential Common Interest Developments: An Overview* (Mar. 1998) <<http://www.library.ca.gov>>.

4. See *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm'n Reports ____ (2002).

5. A “community association” is the body that governs a common interest development. See Civ. Code § 1363(a).

1 to be a just decision, and is more likely to be accepted by a homeowner who would
2 dispute a decision reached under a procedure that is perceived to be unfair.

3 Fair and reasonable procedures are already required by case law⁶ and reflect
4 good public policy. The Commission recommends that fair and reasonable
5 procedures be required when a community association adopts operating rules or
6 reviews a member's request to make changes to the member's separate interest
7 property.⁷ Other types of association decisionmaking are already the subject of
8 statutory or regulatory procedures.⁸

9 SAFE HARBOR APPROACH

10 Common interest developments come in a variety of types and sizes. Some are
11 large, professionally managed communities, resembling small cities. Others
12 include fewer than ten units and are managed entirely by owner-volunteers.

13 Because common interest developments vary so much in size and character, it is
14 not possible to craft a single procedure that is appropriate for every association in
15 every circumstance. For that reason, the proposed law would add general
16 provisions requiring fairness and member participation, without mandating the
17 specific procedure to be followed. Instead, the proposed law would add optional
18 statutory procedures that are deemed to satisfy the general requirements. A
19 community association that follows these "safe harbor" procedures would be sure
20 that its decision could not be challenged on procedural grounds.

21 A safe harbor approach is efficient and preserves flexibility. It also avoids
22 disputes over purely procedural matters that might arise if strict statutory
23 procedures were imposed.

6. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious."); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209 (1983) ("The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.") (citation omitted). There may also be circumstances where decisionmaking by a private community association is subject to the due process requirements of the United States or California Constitutions. See Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 Wm. & Mary Bill Rts. J. 461, 493-94 (1998); Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives, and Planned Developments*, 19 Real Prop., Prob. & Tr. J. 1 (1984).

7. See Civ. Code § 1351(l) ("separate interest" defined).

8. These include procedures for member discipline (see Civ. Code § 1363(g)-(h); Corp. Code § 7341; 10 Cal. Code Regs. § 2792.26(b)), amendment of governing documents (see Civ. Code §§ 1355, 1355.5, 1356; 10 Cal. Code Regs. § 2792.24), and levying and collection of assessments (see Civ. Code §§ 1366-1367).

OPERATING RULES

Existing law recognizes that the board of directors of a community association may adopt “operating rules” to govern the operation of a common interest development.⁹ However, there is no procedure for doing so.

An association’s declaration or bylaws can only be changed with member approval,¹⁰ but an operating rule can be adopted without advance notice to members or member involvement. This is problematic because operating rules can have a significant effect on member interests (e.g., an operating rule could restrict use of common facilities or regulate the appearance of one’s home).

The proposed law would require that the board of directors provide advance notice and an opportunity to comment before adopting or changing an operating rule. The power to adopt and change rules would remain exclusively in the board of directors, but members would have a chance to express their views before a decision is made and would not be surprised by enforcement of a rule that was never announced. An optional “safe harbor” procedure would satisfy the general requirements of notice and an opportunity to comment.

In addition, the proposed law would add a procedure for member reversal of a problematic rule change. Reversal could only be initiated within the first 30 days after a rule change is announced and would only occur if approved by a majority vote at a member meeting at which a quorum is established. This would provide a limited member veto, similar to the power to remove boardmembers that members of an incorporated association enjoy under existing law.¹¹

The proposed law would also make clear that an operating rule is invalid if it contradicts or is unauthorized by law or the association’s governing documents.¹²

REVIEW OF PROPOSED ALTERATION OF SEPARATE INTEREST PROPERTY

The governing documents of many common interest developments require approval of the community association before a member can alter separate interest property. For example, a homeowner might be required to obtain association approval before adding a room, choosing a color of exterior paint, or planting flowers in a front yard. Existing case law requires that such a decision be made in

9. See Civ. Code §§ 1351(j) (“governing documents” includes “operating rules”), 1360.5 (restriction on rules governing pets), 1363(g) (monetary penalty for violation of “governing documents or rules”); 10 Cal. Code Regs. § 2792.21(a) (association may formulate “rules of operation of the common areas and facilities owned or controlled by the Association”).

10. Civ. Code § 1355 (amendment of declaration); 10 Cal. Code Regs. § 2792.24 (amendment of bylaws).

11. See Corp. Code §§ 7222(a) (director may be removed by members, without cause), 7510(e) (members may call special meeting for any lawful purpose).

12. See *MaJor v. Miraverde Homeowners Ass’n, Inc.*, 7 Cal. App. 4th 618, 628, 9 Cal. Rptr. 2d 237, 243 (1992) (“Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a ‘reasonable’ response to a particular circumstance.”).

1 good faith and in a fair and reasonable manner.¹³ The proposed law would codify
2 that general requirement and add an optional “safe harbor” procedure.

3 The optional procedure would provide a two-tiered process. The first level
4 begins with submission of a written application. All members would receive notice
5 of the application and could comment on the proposed alteration. The “reviewing
6 body” then makes its decision.¹⁴ If the reviewing body fails to act, the proposal is
7 deemed disapproved.

8 A decision by the reviewing body (including a deemed disapproval) could be
9 appealed to the board of directors. Appeals would be heard de novo by the board,
10 and any member would be free to testify. The board’s written decision would state
11 the basis for decision, including reference to facts, standards, or provisions of the
12 association’s governing documents that support the decision.

13 The two-tiered process would conserve association resources by providing a
14 relatively streamlined procedure for noncontroversial proposals. Only applications
15 that are actually in dispute would proceed to the more formal level of a hearing
16 before the board of directors. A member who wishes to seek judicial review of the
17 association’s decision would be required to exhaust the internal appeal process
18 first.

19 The proposed law would also make clear that judicial review of a decision on a
20 proposed alteration of a member’s separate interest is subject to existing ADR
21 requirements, even if the relief sought is a writ of mandate.¹⁵

13. See *supra* note 6.

14. The “reviewing body” is the person or group authorized by an association’s governing documents to approve or disapprove a proposed alteration of a separate interest. See proposed Civ. Code § 1378.060(c).

15. Civil Code Section 1354 requires that before filing a civil action to enforce an association’s governing documents, a party must endeavor to submit the dispute to a form of alternative dispute resolution. However, Section 1354 appears not to apply to an action for writ of mandate.

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PROPOSED LEGISLATION

☞ **Note.** The placement of article headings in the following provisions is premised on enactment of the Commission’s recommendation on *Organization of Davis-Stirling Common Interest Development Act*, 33 Cal. L. Revision Comm’n Reports ____ (2002).

1 **Civ. Code § 1350.7 (added). Document delivery**

2 SEC. _____. Section 1350.7 is added to the Civil Code, to read:

3 1350.7. (a) This section applies to delivery of a document to the extent the
4 section is made applicable by another provision of this title.

5 (b) A document shall be delivered by one of the following methods:

6 (1) Personal delivery.

7 (2) First class mail, postage prepaid, addressed to a member at the address last
8 shown on the books of the association or otherwise provided by the member.
9 Delivery is deemed to be complete on the fifth day after deposit into the United
10 States Mail.

11 (3) E-mail, facsimile, or other electronic means, if the sender and recipient have
12 agreed to that method of delivery. A provision of the governing documents
13 providing for electronic delivery does not constitute agreement by a member of an
14 association to that form of delivery. If a document is delivered by electronic
15 means, delivery is complete at the time of transmission.

16 (c) A document may be included in or delivered with a billing statement,
17 newsletter, or other document that is delivered by one of the methods provided in
18 subdivision (b).

19 **Comment.** Section 1350.7 is new. It provides general document delivery rules that apply where
20 this section is incorporated by reference in this title. For provisions incorporating this section by
21 reference, see Sections 1357.150 (rulemaking), 1357.160 (emergency rulemaking), 1378.120
22 (review of proposed alteration of separate interest).

23 Subdivision (b)(2) provides that delivery by mail is subject to the procedure for service of
24 notice by mail. See Code Civ. Proc. § 1013(a). Under that procedure, delivery is complete on
25 deposit in the mail, except that any period of notice and any right or duty to do an act or make any
26 response within any period or on a date certain after the service of the document that is prescribed
27 by statute or rule of court is extended by five calendar days (if the delivery address is within
28 California).

29 See also Sections 1351(a) (“association” defined), 1351(j) (“governing documents” defined).

30 **Civ. Code §§ 1357.100-1357.180 (added). Operating rules**

31 SEC. _____. Article 4 (commencing with Section 1357.100) is added to Chapter 2
32 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 4. Operating Rules

§ 1357.100. “Rule change” defined

1357.100. As used in this article, “rule change” means the adoption, amendment, or repeal of an operating rule by the board of directors of the association.

Comment. Section 1357.100 is new. See also Section 1351(a) (“association” defined).

§ 1357.110. Types of operating rules affected

1357.110. This article applies to an operating rule relating to any of the following subjects:

(a) Use of the common area or of an exclusive use common area.

(b) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.

(c) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.

(d) Assessment collection procedures.

Comment. Section 1357.110 specifies which types of operating rules are governed by this article.

See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l) (“separate interest” defined).

§ 1357.120. Exempt actions

1357.120. This article does not apply to the following actions by the board of directors of an association:

(a) A decision in a specific case that is not intended to apply generally.

(b) A decision setting the amount of a regular or special assessment.

(c) A rule change that is required by law, if the board of directors has no discretion as to the substantive effect of the rule change.

(d) Issuance of a document that merely repeats existing law or the governing documents.

Comment. Section 1357.120 exempts certain actions from application of this article. Subdivision (a) excludes decisions that are adjudicative or executive in nature. Subdivision (b) excludes the setting of generally applicable assessments. Budgeting and the setting of assessments are governed by other law. See Sections 1365-1365.5, 1366. Subdivision (c) reflects the fact that a board of directors may be legally required to make a specific rule change. Subdivision (d) recognizes that mere repetition of an existing rule is not the making of a new rule.

See also Sections 1351(a) (“association” defined), 1351(j) (“governing documents” defined), 1357.100 (“rule change” defined).

§ 1357.130. Validity of operating rule

1357.130. An operating rule is valid and enforceable only if all of the following requirements are satisfied:

(a) The rule is in writing.

(b) The rule is within the authority of the board of directors of the association conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association.

(c) The rule is consistent with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

(d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article.

Comment. Section 1357.130 is new. Subdivisions (b) and (c) provide that an ultra vires operating rule is invalid. See *MaJor v. Miraverde Homeowners Ass'n, Inc.*, 7 Cal. App. 4th 618, 628, 9 Cal. Rptr. 2d 237, 243 (1992) (“Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a ‘reasonable’ response to a particular circumstance.”).

See also Sections 1351(a) (“association” defined), 1351(h) (“declaration” defined).

§ 1357.140. Required procedure

1357.140. The board of directors of an association shall provide members with notice and an opportunity to comment before making a rule change.

Comment. Section 1357.140 is new. See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

§ 1357.150. Optional rulemaking procedure

1357.150. (a) Use of the procedure described in subdivision (b) satisfies the requirements of Section 1357.140. An association is not required to use this procedure.

(b) The board of directors of the association shall deliver notice of a proposed rule change to every association member. The notice shall include all of the following information:

(1) The text of the proposed rule change.

(2) A description of the purpose and effect of the proposed rule change.

(3) The deadline for submission of a comment on the proposed rule change.

(c) For a period of not less than 15 days following delivery of a notice of a proposed rule change, the board of directors shall accept written comments from association members on the proposed rule change.

(d) The board of directors shall consider any comments it receives and shall make a decision on a proposed rule change at a board meeting. A decision shall not be made until after the comment submission deadline.

(e) The board of directors shall deliver notice of a rule change to every association member. The notice shall set out the text of the rule change and state the date the rule change takes effect. The date the rule change takes effect shall be not less than 15 days after notice of the rule change is delivered.

(f) A document that is required to be delivered pursuant to this section is subject to Section 1350.7.

Comment. Section 1357.150 provides an optional procedure for adoption, amendment, or repeal of an operating rule. Subdivision (a) provides that use of the procedure satisfies the

1 requirements of Section 1357.140. Other procedures may also satisfy the requirements of that
2 section.

3 Subdivisions (b) and (e) require that notice be provided to every member. Failure to provide
4 notice to every member will not invalidate a rule change if the failure is inadvertent. See Section
5 1357.130(d) (validity of operating rule).

6 Subdivision (d) provides that a decision on a proposed rule change shall be made at a meeting
7 of the board of directors. See Section 1363.05 (“Common Interest Development Open Meeting
8 Act”).

9 See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

10 **§ 1357.160. Optional emergency rulemaking procedure**

11 1357.160. (a) Use of the procedure described in subdivision (b) satisfies the
12 requirements of Section 1357.140. An association is not required to use this
13 procedure.

14 (b) If the board of directors of an association determines that an immediate rule
15 change is necessary to address an imminent threat to public health or safety, or an
16 imminent risk of substantial economic loss to the association, it may make the rule
17 change immediately.

18 (c) As soon as possible after making a rule change under this section, but not
19 more than 15 days after making the rule change, the board of directors shall
20 deliver notice of the rule change to every association member. The notice shall
21 include the text of the rule change and an explanation of why an immediate rule
22 change is required to address an imminent threat to public health or safety, or an
23 imminent risk of substantial economic loss to the association.

24 (d) A rule change made under this section is effective for 120 days, unless the
25 rule change provides for a shorter effective period.

26 (e) A rule change made under this section may not be readopted under this
27 section.

28 (f) A document that is required to be delivered pursuant to this section is subject
29 to Section 1350.7.

30 **Comment.** Section 1357.160 provides an optional procedure for emergency adoption,
31 amendment, or repeal of an operating rule. Subdivision (a) provides that use of the procedure
32 satisfies the requirements of Section 1357.140. Other procedures may also satisfy the
33 requirements of that section.

34 Subdivision (d) provides that an emergency rule change is temporary.

35 Subdivision (e) makes clear that the effective period of an emergency rule change may not be
36 extended by readopting the rule change under the emergency rulemaking procedure. To readopt a
37 rule change made under this section an association must follow the procedure provided in Section
38 1357.150, or some other procedure that provides for advance notice to members and an
39 opportunity to comment before the rule change is made.

40 See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

41 **§ 1357.170. Rule change reversal**

42 1357.170. (a) Members of an association owning 10 percent or more of the
43 separate interests may call a special meeting to reverse a rule change.

44 (b) A special meeting may be called by delivering a written request on the chair
45 or secretary of the board of directors. The written request may not be delivered

1 more than 30 days after the members of the association are notified of the rule
2 change. Members are deemed to have been notified of a rule change on delivery of
3 notice of the rule change, or on enforcement of the resulting rule, whichever is
4 sooner.

5 (c) The rule change may be reversed by the affirmative vote of a majority of the
6 votes represented and voting at a duly held meeting at which a quorum is present
7 (which affirmative votes also constitute a majority of the required quorum) or by
8 written ballot in conformity with Section 7513 of the Corporations Code, or if the
9 declaration or bylaws require a greater proportion, by the affirmative vote or
10 written ballot of the proportion required.

11 (d) Unless otherwise provided in the declaration or bylaws, for the purposes of
12 this section, a member may cast one vote per separate interest owned.

13 (e) A meeting called under this section is governed by Chapter 5 (commencing
14 with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and
15 7613 of, the Corporations Code.

16 (f) A rule change reversed under this section may not be readopted for one year
17 after the date of the meeting reversing the rule change.

18 **Comment.** Section 1357.170 authorizes member reversal of a recent rule change. This
19 authority is limited to cases where members owning 10 percent or more of the separate interests
20 call a meeting for that purpose within the specified time. This specific provision supersedes the
21 general provision authorizing five percent or more of the members of a nonprofit mutual benefit
22 corporation to call a special meeting. See Corp. Code § 7510(e). The governing documents of an
23 association may provide other additional procedures for member participation in rulemaking.

24 Subdivision (c) is drawn from Corporations Code Section 5034.

25 See also Sections 1351(a) (“association” defined), 1357.100 (“rule change” defined).

26 § 1357.180. Prospective application

27 1357.180. (a) This article applies to a rule change made on or after January 1,
28 2004.

29 (b) Nothing in this article affects the validity of a rule change made before
30 January 1, 2004.

31 **Comment.** Section 1357.180 governs the application of this article.

32 See also Section 1357.100 (“rule change” defined).

33 Civ. Code § 1363 (amended). Management by association

34 SEC. _____. Section 1363 of the Civil Code is amended to read:

35 1363. (a) A common interest development shall be managed by an association
36 which may be incorporated or unincorporated. The association may be referred to
37 as a community association.

38 (b) An association, whether incorporated or unincorporated, shall prepare a
39 budget pursuant to Section 1365 and disclose information, if requested, in
40 accordance with Section 1368.

41 (c) Unless the governing documents provide otherwise, and regardless of
42 whether the association is incorporated or unincorporated, the association may

1 exercise the powers granted to a nonprofit mutual benefit corporation, as
2 enumerated in Section 7140 of the Corporations Code, except that an
3 unincorporated association may not adopt or use a corporate seal or issue
4 membership certificates in accordance with Section 7313 of the Corporations
5 Code.

6 The association, whether incorporated or unincorporated, may exercise the
7 powers granted to an association by Section 383 of the Code of Civil Procedure
8 and the powers granted to the association in this title.

9 (d) Meetings of the membership of the association shall be conducted in
10 accordance with a recognized system of parliamentary procedure or any
11 parliamentary procedures the association may adopt.

12 (e) Notwithstanding any other provision of law, notice of meetings of the
13 members shall specify those matters the board intends to present for action by the
14 members, but, except as otherwise provided by law, any proper matter may be
15 presented at the meeting for action.

16 (f) Members of the association shall have access to association records and
17 operating rules in accordance with Article 3 (commencing with Section 8330) of
18 Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code.

19 (g) If an association adopts or has adopted a policy imposing any monetary
20 penalty, including any fee, on any association member for a violation of the
21 governing documents or rules of the association, including any monetary penalty
22 relating to the activities of a guest or invitee of a member, the board of directors
23 shall adopt and distribute to each member, by personal delivery or first-class mail,
24 a schedule of the monetary penalties that may be assessed for those violations,
25 which shall be in accordance with authorization for member discipline contained
26 in the governing documents. The board of directors shall not be required to
27 distribute any additional schedules of monetary penalties unless there are changes
28 from the schedule that was adopted and distributed to the members pursuant to this
29 subdivision.

30 (h) When the board of directors is to meet to consider or impose discipline upon
31 a member, the board shall notify the member in writing, by either personal
32 delivery or first-class mail, at least 10 days prior to the meeting. The notification
33 shall contain, at a minimum, the date, time, and place of the meeting, the nature of
34 the alleged violation for which a member may be disciplined, and a statement that
35 the member has a right to attend and may address the board at the meeting. The
36 board of directors of the association shall meet in executive session if requested by
37 the member being disciplined.

38 If the board imposes discipline on a member, the board shall provide the member
39 a written notification of the disciplinary action, by either personal delivery or first-
40 class mail, within 15 days following the action. A disciplinary action shall not be
41 effective against a member unless the board fulfills the requirements of this
42 subdivision.

(i) Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be entitled to attend all meetings of the joint association other than executive sessions, (1) shall be given reasonable opportunity for participation in those meetings and (2) shall be entitled to the same access to the joint association's records as they are to the participating association's records.

(j) Nothing in this section shall be construed to create, expand, or reduce the authority of the board of directors of an association to impose monetary penalties on an association member for a violation of the governing documents or rules of the association.

Comment. Subdivision (f) of Section 1363 is amended to make clear that an association's operating rules are subject to inspection by members.

See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development" defined), 1351(j) ("governing documents" defined).

Civ. Code § 1368 (amended). Owner's disclosure

SEC. _____. Section 1368 of the Civil Code is amended to read:

1368. (a) The owner of a separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall, as soon as practicable before transfer of title to the separate interest or execution of a real property sales contract therefor, as defined in Section 2985, provide the following to the prospective purchaser:

(1) A copy of the governing documents of the common interest development, including any operating rules, and including a copy of the association's articles of incorporation, or, if not incorporated, a statement in writing from an authorized representative of the association that the association is not incorporated.

(2) If there is a restriction in the governing documents limiting the occupancy, residency, or use of a separate interest on the basis of age in a manner different from that provided in Section 51.3, a statement that the restriction is only enforceable to the extent permitted by Section 51.3 and a statement specifying the applicable provisions of Section 51.3.

(3) A copy of the most recent documents distributed pursuant to Section 1365.

(4) A true statement in writing obtained from an authorized representative of the association as to the amount of the association's current regular and special assessments and fees, any assessments levied upon the owner's interest in the common interest development that are unpaid on the date of the statement, and any monetary fines or penalties levied upon the owner's interest and unpaid on the date of the statement. The statement obtained from an authorized representative shall also include true information on late charges, interest, and costs of collection which, as of the date of the statement, are or may be made a lien upon the owner's interest in a common interest development pursuant to Section 1367 or 1367.1.

(5) A copy or a summary of any notice previously sent to the owner pursuant to subdivision (h) of Section 1363 that sets forth any alleged violation of the

1 governing documents that remains unresolved at the time of the request. The
2 notice shall not be deemed a waiver of the association's right to enforce the
3 governing documents against the owner or the prospective purchaser of the
4 separate interest with respect to any violation. This paragraph shall not be
5 construed to require an association to inspect an owner's separate interest.

6 (6) A copy of the preliminary list of defects provided to each member of the
7 association pursuant to Section 1375, unless the association and the builder
8 subsequently enter into a settlement agreement or otherwise resolve the matter and
9 the association complies with Section 1375.1. Disclosure of the preliminary list of
10 defects pursuant to this paragraph shall not waive any privilege attached to the
11 document. The preliminary list of defects shall also include a statement that a final
12 determination as to whether the list of defects is accurate and complete has not
13 been made.

14 (7) A copy of the latest information provided for in Section 1375.1.

15 (8) Any change in the association's current regular and special assessments and
16 fees which have been approved by the association's board of directors, but have
17 not become due and payable as of the date disclosure is provided pursuant to this
18 subdivision.

19 (b) Upon written request, an association shall, within 10 days of the mailing or
20 delivery of the request, provide the owner of a separate interest with a copy of the
21 requested items specified in paragraphs (1) to (8), inclusive, of subdivision (a).
22 The association may charge a fee for this service, which shall not exceed the
23 association's reasonable cost to prepare and reproduce the requested items.

24 (c) An association shall not impose or collect any assessment, penalty, or fee in
25 connection with a transfer of title or any other interest except the association's
26 actual costs to change its records and that authorized by subdivision (b).

27 (d) Any person or entity who willfully violates this section shall be liable to the
28 purchaser of a separate interest which is subject to this section for actual damages
29 occasioned thereby and, in addition, shall pay a civil penalty in an amount not to
30 exceed five hundred dollars (\$500). In an action to enforce this liability, the
31 prevailing party shall be awarded reasonable attorneys' fees.

32 (e) Nothing in this section affects the validity of title to real property transferred
33 in violation of this section.

34 (f) In addition to the requirements of this section, an owner transferring title to a
35 separate interest shall comply with applicable requirements of Sections 1133 and
36 1134.

37 **Comment.** Subdivision (a) of Section 1368 is amended to make clear that the required
38 disclosure of the governing documents of a common interest development includes disclosure of
39 any operating rules.

40 See also Sections 1351(a) ("association" defined), 1351(c) ("common interest development"
41 defined), 1351(j) ("governing documents" defined), 1351(l) ("separate interest" defined).

Heading of Article 1 (commencing with Section 1376) (added)

SEC. _____. An article heading is added immediately preceding Section 1376 of the Civil Code, to read:

Article 1. Video or Television Antenna

Civ. Code §§ 1378.010-1378.030 (added). Review of proposed alteration of separate interest

SEC. _____. Article 2 (commencing with Section 1378.010) is added to Chapter 10 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

Article 2. Review of Proposed Alteration of Separate Interest

§ 1378.010. Application of article

1378.010. If an association's governing documents require that an owner of a separate interest obtain association approval before altering a separate interest, exclusive use common area, or part of the common area, this article governs the association's decisionmaking process.

Comment. Section 1378.010 is new. See also Sections 1351(a) ("association" defined), 1351(b) ("common area" defined), 1351(i) ("exclusive use common area" defined), 1351(j) ("governing documents" defined), 1351(l) ("separate interest" defined), 1360 (modification of separate interest contained within building).

§ 1378.020. Good faith, fair and reasonable procedure required

1378.020. (a) A decision to approve or disapprove a proposed alteration of a member's separate interest, an exclusive use common area, or part of the common area, shall be made in good faith and in a fair and reasonable manner.

(b) The procedure provided in Article 3 (commencing with Section 1378.050) is fair and reasonable. Other procedures may also be fair and reasonable under the circumstances.

Comment. Subdivision (a) of Section 1378.020 is consistent with case law requiring that an association enforce its governing documents in good faith and in a fair and reasonable manner. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious."); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209 (1983) ("The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.... This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.") (citation omitted).

Subdivision (b) establishes the procedure provided in Article 3 as a safe harbor. An association is not required to use the statutory procedure. It may use any procedure that is fair and reasonable under the circumstances. For example, an association might decide to use the statutory procedure to review structural changes, while adopting a simpler procedure for review of minor landscaping improvements.

1 See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area”
2 defined), 1351(l) (“separate interest” defined).

3 **§ 1378.030. Alternative dispute resolution**

4 1378.030. A writ proceeding for review of a decision to approve or disapprove a
5 proposed alteration of a member’s separate interest, an exclusive use common
6 area, or part of the common area, is subject to Section 1354.

7 **Comment.** Section 1378.030 is new. This section supersedes language in Section 1354(b)
8 limiting the alternative dispute resolution provisions to civil actions for declaratory or injunctive
9 relief.

10 See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area”
11 defined), 1351(l) (“separate interest” defined).

12 **Civ. Code §§ 1378.050-1378.120 (added). Review of proposed alteration of separate interest**

13 SEC. _____. Article 3 (commencing with Section 1378.050) is added to Chapter 10
14 of Title 6 of Part 4 of Division 2 of the Civil Code, to read:

15 Article 3. Optional Procedure

16 **§ 1378.050. Nature of procedure**

17 1378.050. This article provides a fair and reasonable procedure that an
18 association may use in reviewing a member’s proposed alteration of a separate
19 interest, an exclusive use common area, or part of the common area. Use of the
20 procedure is not mandatory.

21 **Comment.** Section 1378.050 makes clear that the procedure provided in this article is optional.
22 However, a decision made in good faith, under the procedure provided in this article, satisfies the
23 requirements of Section 1378.020. See Section 1378.020(b).

24 See also Sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i)
25 (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

26 **§ 1378.060. Definitions**

27 1378.060. (a) The definitions in this section govern the construction of this
28 article.

29 (b) “Participating member” means an association member who, before the
30 reviewing body makes its decision on the proposed alteration, submits to the
31 reviewing body a comment opposed to a proposed alteration of a separate interest,
32 exclusive use common area, or part of the common area.

33 (c) “Reviewing body” means the person or group authorized by an association’s
34 governing documents to approve or disapprove the alteration of a separate interest,
35 exclusive use common area, or part of the common area.

36 **Comment.** Section 1378.060 is new. In some associations the reviewing body is the board of
37 directors. In that situation, an appeal to the board of directors would result in reconsideration of
38 the board’s decision as the reviewing body and issuance of a written decision to serve as a record
39 in any judicial review of the decision on appeal. See Sections 1378.090 (appeal to board),
40 1378.100 (judicial review).

1 See also Sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i)
2 (“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l)
3 (“separate interest” defined).

4 **§ 1378.070. Approval process**

5 1378.070. (a) An association member who proposes to alter a separate interest
6 shall submit a written application to the reviewing body. The application shall be
7 in the form specified by the association. An incomplete application may be
8 returned to the applicant with an explanation of why the application is incomplete.
9 No further action is required on an application that is returned as incomplete.

10 (b) Within 30 days after receipt of the application, the reviewing body shall
11 deliver notice of the application to the following persons:

12 (1) If the proposed alteration would affect the common area, to all members.

13 (2) If the association delivers a newsletter, billing statement, or other document
14 to all members at least once a month, to all members.

15 (3) If the proposed alteration would not affect the common area and the
16 association does not deliver a newsletter, billing statement, or other document to
17 all members at least once a month, to members owning separate interests within
18 500 feet of, or located within the same building as, the separate interest that is the
19 subject of the proposed alteration.

20 (c) The notice shall include the address or location of the separate interest,
21 exclusive use common area, or part of the common area, that is the subject of the
22 application, a description of the proposed alteration adequate to inform other
23 members of its nature, and the date after which the reviewing body may make its
24 decision.

25 (d) Not less than 20 days nor more than 45 days after delivery of the notice of
26 the application, the reviewing body shall deliver a written decision to the applicant
27 and to any participating member. If the reviewing body does not deliver a written
28 decision to the applicant within 45 days after delivery of the notice of application,
29 the application is deemed disapproved on the 45th day.

30 (e) A written decision approving a proposed alteration of a separate interest,
31 exclusive use common area, or part of the common area, shall state whether the
32 reviewing body received any comments opposing the alteration.

33 **Comment.** Section 1378.070 is new. See also Sections 1351(a) (“association” defined),
34 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(j)
35 (“governing documents” defined), 1351(l) (“separate interest” defined), 1378.060(b)
36 (“participating member” defined), 1378.060(c) (“reviewing body” defined), 1378.120 (delivery of
37 document).

38 **§ 1378.080. Commencement of approved alteration**

39 1378.080. (a) Except as provided in subdivision (b), an applicant may not
40 commence work on an approved alteration of a separate interest, exclusive use
41 common area, or part of the common area, until either the period for appeal passes
42 without an appeal being filed or the approval is upheld on appeal.

(b) If a written decision approving alteration of a separate interest, exclusive use common area, or part of the common area, states that no member comments opposing the alteration were received by the reviewing body before it made its decision, the applicant may commence work on the approved alteration immediately.

Comment. Section 1378.080 is new. See also Sections 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined), 1378.090 (appeal to board).

§ 1378.090. Appeal to board

1378.090. (a) An applicant or participating member may appeal the approval or disapproval of a proposed alteration of a separate interest, exclusive use common area, or part of the common area, to the board of directors of the association. The appeal shall be in writing and shall be delivered to the board of directors within 30 days after the reviewing body’s decision is delivered or the proposed alteration is deemed disapproved.

(b) Within 30 days after receipt of a timely request for appeal, the board of directors shall deliver notice of the appeal to the following persons:

(1) If the proposed alteration would affect the common area, to all members.

(2) If the association delivers a newsletter, billing statement, or other document to all members at least once a month, to all members.

(3) If the proposed alteration would not affect the common area and the association does not deliver a newsletter, billing statement, or other document to all members at least once a month, to members owning separate interests within 500 feet of, or located within the same building as, the separate interest that is the subject of the proposed alteration.

(c) The notice of appeal shall state the time and place where the appeal will be heard.

(d) Within 45 days after notice of the appeal is delivered, the board of directors shall meet and review de novo the proposed alteration that is the subject of the appeal. Any association member may testify at the appeal and may submit written materials in support of or in opposition to the proposed alteration.

(e) Within 15 days after hearing the appeal, the board of directors shall deliver its decision to the applicant and, if the appeal is by a person other than the applicant, to that person. The decision shall be in writing and shall include a statement explaining the basis for the decision, including reference to facts, standards, or provisions of the governing documents that support the decision.

Comment. Section 1378.090 is new. See also sections 1351(a) (“association” defined), 1351(b) (“common area” defined), 1351(i) (“exclusive use common area” defined), 1351(j) (“governing documents” defined), 1351(l) (“separate interest” defined), 1378.060(b) (“participating member” defined), 1378.060(c) (“reviewing body” defined), 1378.120 (delivery of document).

1 **§ 1378.100. Judicial review**

2 1378.100. (a) A decision of the reviewing body made under Section 1378.070 is
3 not subject to judicial review.

4 (b) Any member may seek judicial review of a decision of the board of directors
5 of the association made under Section 1378.090. Judicial review may be by writ of
6 administrative mandamus, pursuant to Section 1094.5 of the Code of Civil
7 Procedure.

8 **Comment.** Section 1378.100 is new. Judicial review is only available to review a decision of
9 the board of directors on appeal. Thus, the internal appeal process must be exhausted before a
10 member may seek judicial review of a decision on a proposed alteration.

11 Subdivision (b) provides that a decision on a proposed alteration of a separate interest may be
12 reviewed under the procedure for administrative mandamus. This does not preclude other
13 applicable forms of relief.

14 See also Sections 1351(a) (“association” defined), 1351(j) (“governing documents” defined),
15 1378.060(c) (“reviewing body” defined).

16 **§ 1378.110. Scope of inquiry**

17 1378.110. In making a decision to approve or disapprove a proposed alteration
18 of a member’s separate interest, an exclusive use common area, or part of the
19 common area, the reviewing body or board of directors may consider any relevant
20 information. The reviewing body or board of directors is not required to consider
21 information other than that provided to the reviewing body or board of directors.

22 **Comment.** Section 1378.110 is new. See also Sections 1351(b) (“common area” defined),
23 1351(i) (“exclusive use common area” defined), 1351(l) (“separate interest” defined).

24 **§ 1378.120. Delivery of document**

25 1378.120. A document that is required to be delivered pursuant to this article is
26 subject to Section 1350.7.

27 **Comment.** Section 1378.120 is new.
